

**Don's Bus Company, Inc. and Mervin Kukahiwa.**  
Case 37-CA-1590-1

June 1, 1981

**DECISION AND ORDER**

On December 10, 1980, Administrative Law Judge Martin S. Bennett issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

<sup>1</sup> The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

**DECISION**

**STATEMENT OF THE CASE**

MARTIN S. BENNETT, Administrative Law Judge: This matter was heard before me in Honolulu, Hawaii, on July 29 and 30, 1980. The complaint issued January 30, 1980, and is based upon a charge filed by Mervin Kukahiwa on December 14, 1979, alleges that Respondent, Don's Bus Company, Inc., was engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act. Briefs have been submitted by the General Counsel and Respondent and have been carefully considered.

Upon the entire record in the case, and from my observation of the witnesses, including their demeanor, I make the following:

**FINDINGS OF FACT**

**I. JURISDICTIONAL FINDINGS**

Don's Bus Company, Inc., herein called Respondent, is a Hawaii corporation with an office and place of business in Honolulu, which is engaged in the operation of a bus freight primarily involved in the transportation of children to and from school and with a portion of its oper-

ation involved in transporting private charter groups. Respondent annually receives gross revenues in excess of \$500,000. It also purchases and receives supplies originating outside the State of Hawaii valued in excess of \$50,000 per annum. I find that the operations of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

**II. THE ALLEGED UNFAIR LABOR PRACTICES**

**A. Introduction; the Issues**

Respondent is under contract to the city and county of Honolulu to transport children to and from schools. It also provides charter services to public schools as well as other groups. It maintains two garages in Honolulu, one on Sand Island and the other at Campbell Industrial Park, which are approximately 32 miles apart.

The drivers customarily complete their morning run and either return the bus to the garage or proceed on a charter. Some of the buses are equipped with two-way radios to inform the garage of breakdowns.

The Company has rules, copies of which are given to each driver at the beginning of the school year. They provided, in part, that drivers are responsible for the servicing of fuel, oil, water, checking of battery, and cleanliness. They also provide that no driver would switch buses with another driver without the approval of a supervisor. Each driver has a bus which is assigned to him. Prechecking of buses includes the checking of the condition of the tires on the bus.

The Charging Party, Mervin Kukahiwa, herein called Kukahiwa, had worked for Respondent for about 3 years prior to his termination at Sand Island on December 13, 1979. He had previously worked at its other facility at Campbell Industrial Park.

In October 1979, about 2 months prior to his discharge, Kukahiwa allowed his 16-year-old nephew, not a licensed driver, to operate the company bus. Respondent had previously experienced problems with Kukahiwa carrying unauthorized passengers and he had been warned about this.

When warned for permitting his nephew to drive the bus, Kukahiwa became insolent towards Assistant Supervisor Frances Iaea, assistant supervisor of the Campbell Industrial Park facility; it is clear that Iaea is a supervisor within the meaning of Section 2(11) of the Act. As a result of this, Iaea threatened to resign if Kukahiwa was not discharged. As a result, President Donald Gomes of Respondent left orders to terminate Kukahiwa. Supervisor Walter Kuiee of the Campbell Industrial Park told Kukahiwa the next morning that he had been discharged. As a result, Kukahiwa went to Sand Island and pleaded with Gomes to allow him to continue working. Gomes ultimately relented and permitted Kukahiwa to return to work on condition that he drive at the Sand Island facility.

On December 11, Gomes convened a meeting of the Sand Island drivers. He was concerned about "sandbagging" when charter drivers did not return to make their afternoon school runs. This was a concern to Gomes because the State levies a fine if students are not picked up

by the scheduled bus. Gomes also cautioned the drivers about the use of drugs because one driver had an accident while under the influence of marijuana; he also discussed safety procedures.

Kukahiwa asked about checking the tires on his bus, stating that he could not tell when his bus had a flat tire. This surprised Gomes because of Kukahiwa's experience and his years with the Company. Indeed, Kukahiwa complained that he did not want to soil his clothing when checking his tires, and Gomes advised him to use a stick like the other drivers did.

After the meeting, Gomes told Kukahiwa that he wanted to talk to him in his office about an accident. Kukahiwa and his girlfriend, Kaneakua, accompanied Gomes to the office. Gomes pointed out that it reflected badly on him as a driver to confess that he did not know that the tires on his bus were flat. Gomes pointed out that his first priority was meeting his obligation under the state school transportation contract and he also cautioned Kukahiwa about using marijuana during working hours.

As a result, Kukahiwa asked permission to hold a drivers' meeting without the presence of supervisors. Gomes promptly granted permission for this meeting and Gomes agreed that this could be held in the shed where meetings of drivers are normally conducted.

Kukahiwa and Kaneakua informed drivers on December 11 and 12 that a meeting was scheduled on the afternoon of December 12. Kukahiwa on this occasion reviewed operating conditions on the buses and he voiced his opinion that Gomes was buying bad parts for the buses. He also emphasized to the drivers that if the bus was not safe to drive the driver should park it and wait for the problem to be resolved.

The subject of the union cards was not discussed. Gomes heard from other drivers later that night that Kukahiwa wanted to be the "whit" of the drivers.

The following day, December 13, Kukahiwa reported to work at the normal time, 6:30 a.m. After the start of loading the students at the school, he was approached by driver Zumero who pointed out that his bus had defective brakes. He offered Kukahiwa a charter that he was due to pick up; Kukahiwa declined this, but offered to take Zumero's bus back to the yard while Zumero used the bus of Kukahiwa to make the charter run.

Barbara Gomes, the wife of the president, was in the office that morning and heard a third driver, Guerrero, radio in that Zumero was experiencing difficulty with the brakes on his bus. She immediately radioed to another driver to pick up the charter. Guerrero also radioed in that Kukahiwa and Zumero were planning to trade buses. She told Guerrero to instruct Kukahiwa and Zumero not to swap buses because a bus had already been dispatched and that Zumero should wait for a mechanic to arrive and check his bus.

Kukahiwa had been in the bus of Zumero preparing to depart when he interpreted a movement by Zumero to be a sign that the swap had been approved. He drove the bus of Zumero back to the Sand Island yard. Zumero, as well, drove the bus of Kukahiwa back to the Sand Island yard and arrived some minutes after Kukahiwa did.

Gomes had heard the initial radio report of brake trouble and immediately dispatched mechanic Abe Pauole to check this. However, before Pauole could reach the bus both Zumero and Kukahiwa had returned. Pauole tested the brakes and found that the master cylinder was leaking which caused the air pressure to drop considerably.

Gomes became upset over the risk that Kukahiwa had taken by driving the bus with bad brakes and expressed his frustration at this disregard of safety rules. Kukahiwa followed Gomes into the office and was given the option of resigning or being fired.

Gomes planned to drive the afternoon run of Kukahiwa because he already had a shortage of drivers. Kukahiwa asked if he could accompany Gomes on the run so that they could talk and Gomes agreed; Kukahiwa asked why he had been fired. Gomes referred to the bus-swapping incident as well as the carrying of unauthorized passengers by Kukahiwa. The latter then suggested that he could help Respondent if he were made a supervisor.

On the morning of December 13, Kukahiwa and Kaneakua went to the yard at Sand Island and confronted Barbara Gomes. Kukahiwa asked if he had been fired and Gomes told him to ask her husband. Ultimately Barbara Gomes said it was for disobeying company rules and harsh words were exchanged. Barbara Gomes told Kukahiwa that she felt he had betrayed her and her husband by asking them for loans and then turning around and violating company rules. She asked them to leave and they finally departed. Thereafter, Kukahiwa filed a charge which became the basis of the complaint in this matter.

On December 19, a meeting of drivers was held at the Campbell facility. One of the drivers, Annie Ahoi, asked Assistant Supervisor Iaea if Kukahiwa had been discharged. Iaea responded in the affirmative and alleged that it was for the unauthorized swapping of buses. Sometime after this meeting Ahoi asked Iaea if the latter knew that union organization was taking place. Iaea replied in the affirmative, but added that she felt it was none of her business. The precise date of this conversation is not certain but Respondent had received a notice of the representation hearing on December 20.

Respondent held a Christmas party on December 21 and both Kukahiwa and Kaneakua went to the Sand Island yard because Kukahiwa believed he was entitled to attend the party and also wanted to pick up his last paycheck. On this occasion Gomes told Kukahiwa that he was given a \$200 loan for the funeral expenses of a child born to him and to Kaneakua. On this occasion Kukahiwa again asked Gomes for the reasons for his termination, and she provided three; namely, failure to check his bus, carrying unauthorized passengers, and the bus-swapping incident of December 12.

#### *B. The Organizing Attempt*

On January 22 and 23, a consent election was held at the Sand Island facility. On May 23, 1980, it was certified that no labor organization was the exclusive representative of the drivers, mechanics, and washboys at this facility. Gomes had consented to this election on Decem-

ber 27 following the filing of a petition by Hawaii Teamsters and Allied Workers Union, Local 996, herein called the Union, on December 10, 1976; the date on which this petition was received by the office is not known. A letter dated December 10 concerning certification procedures was sent to the Company, but the witnesses did not recall when it was received.

Union activity first came into the picture in November when two meetings were held, one at the beachhouse of Annie Ahoi, and another at her mother's home. The first meeting was held on November 8, and the second on November 28. Cards were distributed at both meetings, which Kukahiwa attended. It appears that Kukahiwa, Kaneakua, and Ahoi all signed cards during this procedure.

Kukahiwa and Kaneakua took cards to obtain signatures from other drivers. It was agreed that nothing would be said to management until enough cards were obtained. It appears that these cards were distributed in December but there was a conflict as to whether any cards were handed out in November.

The record indicates that two meetings were held after the petition for certification was filed and that one of them at Waipahu definitely took place after Kukahiwa had been terminated.

### *C. Discussion*

Respondent contends that the General Counsel has not shown that Gomes was aware of any union activity prior to the discharge of Kukahiwa on December 13 and further that there was no evidence that this prompted his discharge. It urges and the evidence preponderates that Kukahiwa was terminated for his failure to abide by the safety and operational rules of Respondent.

Kukahiwa and Kaneakua were the only witnesses who testified that Gomes stated that he was thinking of unionizing and he referred to a friend named Harold DeCosta at the meeting of the drivers on December 11. No other witnesses were produced to corroborate this.

Respondent points out that to establish the knowledge of Gomes of union activity one would have to assume that the petition was not only filed on December 10 but that it was mailed on December 10 and reached Respondent the day after it was filed on December 11, and that it was brought to the attention of Gomes on that same day. It would then follow that Gomes, having read the petition, immediately called DeCosta of the Teamsters Union. Without this, the record is silent as to Gomes learning of any union activity before the petition was filed and brought to his attention.

The record warrants the finding and I so find that Gomes convened a meeting on December 11 for a legitimate business reason, namely, his concern over sandbagging. All witnesses were in accord that the purpose of the meeting was to warn the drivers that if sandbagging continued the reduction in the number of charter operations was inevitable.

Respondent contends that the testimony of Kukahiwa and Kaneakua is full of inconsistencies and contradictions so as to seriously impair its credibility. Kaneakua has a direct pecuniary interest in the outcome of this case, it is contended, and is aware of potential backpay.

Kukahiwa and Kaneakua contradicted each other a number of times during the hearing and their testimony as to the distribution of authorization cards is badly jumbled. Kaneakua testified that cards were handed out monthly. She testified that cards were handed out in December but denied that any were handed out in November.

It appears also from her testimony that cards were distributed only late in December, around Christmas, following the petition for certification filed on December 10. On the other hand, Kukahiwa testified that cards were passed out during November and December with the two of them working as a team; however, Kaneakua was on maternity leave throughout October, November, and December and would be at the yard only to drop off and pick up Kukahiwa.

The cards of Kukahiwa and Kaneakua were introduced in evidence and both were dated November 8. The cards of Kukahiwa and Kaneakua were introduced in evidence to show their presumable union activity and, as stated, they are dated November 8.

To sum up, the General Counsel relies on the testimony of the Charging Party and his girlfriend to establish that Gomes knew of union activity at Sand Island. The testimony alleges that Gomes talked about union activity at the December 11 meeting of the drivers. However, no other drivers who were present were called to testify, which I deem significant. Stated otherwise the record does not establish to my satisfaction that Gomes knew of union activity in this matter. In the ultimate, the record will not support a finding that Respondent knew of the involvement of Kukahiwa's union activity and discharged him for this reason.

Even if Gomes was aware of the union petition when he discharged Kukahiwa there is no link between the petition and Kukahiwa. Indeed, both Gomes and Kukahiwa testified that their relationship was most amicable. They had known each other for about 25 years, Gomes and his wife had loaned money to Kukahiwa and Kaneakua and it does not follow that a driver in this category was the impetus behind the union organizing effort. Stated otherwise, there is absolutely no evidence that Gomes may have thought that Kukahiwa believed that union membership would have a salutary effect on his employment.

The General Counsel has not established on a preponderance of the evidence hostility or discriminatory motive for the discharge of Kukahiwa. Gomes did agree to a consent election. The fact that Gomes testified that he did know a Teamsters official, DeCosta, for many years does not alter this picture. Indeed, Gomes further admitted that by his own count eight or nine former Teamsters were working for him.

I conclude the evidence warrants a finding that Kukahiwa was discharged for legitimate business reasons. I further find his discharge was compelled by his flagrant disregard of well-known company policies. He did, without authorization, swap buses with Zumero on December 13, and company rules required management approval thereof.

The record warrants a finding that brake failure is a paramount concern to Respondent. In addition, Gomes

observed Kaneakua accompany Kukahiwa on his runs in December, and Kukahiwa had been previously warned about carrying unauthorized passengers, and in fact that was one of the reasons for his prior termination at the yard at Campbell.

The inability of Kukahiwa to check the tires on his bus to ascertain if they were flat was another factor in his discharge. Kukahiwa admitted that he knew this was a part of the prechecking procedure. That Respondent was not biased against Kukahiwa is demonstrated by the fact that he had been previously discharged and reinstated less than 2 months before. See *L'eggs Products Incorporated v. N.L.R.B.*, 619 F.2d 1337, 1341 (9th Cir. 1980).

It is the position of Respondent that it only had one motive in discharging Kukahiwa, namely, his continual violation of company rules, and draws attention to his prior termination. Indeed, there is no allegation that his first discharge in October was not warranted.

As for the allegation that Respondent engaged in conduct violative of Section 8(a)(1) of the Act, the General Counsel called two witnesses, Ahoi and Gracioza, to testify as to discussion at a December 19 meeting of drivers. Both are drivers at the Campbell yard. Ahoi contradicted herself in testimony and testified inconsistently with her pretrial affidavit. Moreover, the testimony of Gracioza was spotty at best. He did not recall most of what Ahoi testified to and testified in contradiction of Ahoi numerous times. Iaea testified that no mention of the

Union was made at the December 19 meeting. She did state that a few days thereafter she admitted to Ahoi that she was aware of the pending petition, but did not want to discuss it. I do not believe that the evidence herein preponderates in favor of the position of the General Counsel.

#### CONCLUSIONS OF LAW

1. Don's Bus Company, Inc., is an employer whose operations affect commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>1</sup>

The complaint is dismissed in its entirety.

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<sup>1</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.